IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 10602 OF 2005
WITH
SPECIAL CIVIL APPLICATION Nos. 10603 to 10605 of 2005
AND
CIVIL APPLICATION No. 9030 of 2005
In
SPECIAL CIVIL APPLICATION No. 10602 of 2005

For Approval and Signature:

HON'BLE MR. JUSTICE M.S. SHAH
AND
HON'BLE MR. JUSTICE D.H. WAGHELA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GUJARAT PRADESH PANCHAYAT PARISHAD - Petitioner(s)
Versus
STATE ELECTION COMMISSION & 4 - Respondent(s)

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Appearance :

MR YATIN OZA SR ADVOCATE with MR TUSHAR MEHTA for petitioners.
MR SN SHELAT ADVOCATE GENERAL with MR NV ANJARIA for Respondent No.1

MR KAMAL TRIVEDI ADDL. ADVOCATE GENERAL with Ms SANGITA VISHEN AGP for Respondent No.2.

MR AD OZA GOVERNMENT PLEADER for Respondent No.3

CIVIL APPLICATION No. 9030 of 2005

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HITESHBHAI KANTILAL BAROT - Petitioner(s)

Versus

STATE ELECTION COMMISSION & 5 - Respondent(s)

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Appearance :

MR MIHIR JOSHI with MR SN THAKKAR for Applicant
MR SN SHELAT ADVOCATE GENERAL with MR NV ANJARIA for Respondent No.1
MR KAMAL TRIVEDI ADDL. ADVOCATE GENERAL with Ms SANGITA VISHEN AGP for Respondent No.2; 2/1, 2/2, 4-6
MR YATIN OZA SR ADVOCATE with MR TUSHAR MEHTA for Respondent No.3
MR AD OZA GOVERNMENT PLEADER for Respondent No.7
MR VIJAY PATEL for HL PATEL ADVOCATES for BHARAT PATEL, Ex Sarpanch of THALTEJ GRAM PANCHAYAT (INTERVENER)==========

CORAM : HONOURABLE MR.JUSTICE M.S.SHAH

and

HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 29/09/2005

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

These petitions raise important questions about the nature of the time limits for holding elections to panchayats and the importance to be attached to the constitutional provisions for such time limits vis-a-vis the other constitutional provisions and the provisions of the Gujarat Panchayat Act, 1993 ("the Act" for brevity) in the matter of holding elections to panchayats and other institutions of local self-government.

2. In May 2005, this group of petitions came to be filed by Gujarat Pradesh Panchayat Parishad ("Parishad" for brevity) and some of its members (two district panchayats and one taluka panchayat through its respective Presidents) for a writ of mandamus to direct the State Election Commission to complete elections to district panchayats and taluka panchayats in the State, by September 2005.

The Parishad is a Society registered under the Societies Registration Act, 1860. All the Panchayats in the State at various levels are the members of the Parishad. The elected Presidents of District Panchayats are members of the executive committee of the Parishad.

By letter dated 24.2.2005 (Annexure-A), the Parishad reminded the respondent-authorities of their duty to hold timely elections to Panchayats. By reply dated 9.3.2005 (Annexure-E), the Minister for Panchayats of the State Government replied that the Principal Secretary (Panchayats) is being instructed to take the necessary action. On 21.4.2005 there were newspaper reports in two leading Gujarati dailies that the Government will hold elections to Municipal Corporations and Panchayats in September 2005 within the time limit. However, all of a sudden on 11.5.2005, there was another newspaper report about uncertainty in holding elections as the State Election Commission was not informed to commence the process. The petitioners accordingly moved these petitions on 22.5.2005.

3. This Court issued notice on 1.6.2005. As far as the State Government is concerned, the only affidavit on record is dated 28.6.2005 stating that 60 gram

panchayats have crossed the population limit of 15000 and, therefore, are to be converted into municipalities and, therefore, such conversion will affect the boundaries of taluka panchayats and district panchayats as well as the number of seats and voters for the purpose of elections to such panchayats. Hence the Delimitation Commission has been approached on 24.6.2005 for seeking its approval in view of the general ban imposed by it against alteration of existing boundaries of the taluka panchayats. After receipt of the approval from the Delimitation Commission requisite notifications will be issued as required by the provisions of Sec.10 and 11 of the Act declaring the number of seats and the percentage of reservation in various areas which will be done within about 15 days' time and thereafter it is for the State Election Commission to proceed in the matter for delimitation of wards, preparation and publication of electoral rolls and the conduct of the election process and its preparation.

4. On 1st August 2005 a statement was made on behalf of the State Election Commission that after the State Government issues notifications for this purpose the State Election Commission will take urgent steps to hold the elections in time and to see that no constitutional crisis comes up. The stand of the State Election Commission in the affidavit dated 5th/8th August was, inter-alia, as under:-

> "considering the fact that elections to large number of bodies of Panchayat as mentioned above were becoming due in October 2005 and considering the fact that the census figures of 2001 were already published, the State Election Commission addressed series of letters dt.18.3.2004, 25.5.2004, 10.8.2004, 24.9.2004, 31.1.2005, 23.2.2005, 19.3.2004, 19.4.2005, 24.5.2005 and 22.7.2005 to the State Government requesting and reminding about reservations of seats. .. Meetings were also held by the State Election Commission with the officials of the concerned department as well as officers of the Development Commissioner on 6.4.2004, 23.4.2004,

> 19.7.2004, 28.9.2004, 19.11.2004, 6.11.2005 and 28.4.2005 in the matter and necessary prompt action was requested. ... It was not possible for the State Election Commission to commence its statutory task of formation of electoral divisions, namely the wards, of the Panchayat areas without the seats being determined and reserved by the State Government ... "

Reference was made in the affidavit to the provisions in Part IX of the Constitution and the Panchayats Act regarding readjustment of seats, delimitation of constituencies, reservation of seats, conversion of gram panchayats into nagarpanchayats where the population exceeds 15000 as per the 2001 census. It was also stated on behalf of the Commission that the entire process will take about NINE MONTHS i.e by 1st week of May 2006. The affidavit concluded with the following paragraph :-

> "I respectfully submit that while the State Election Commission has been alive to the need of commencing the election process, in conducting the elections it has to be guided by the law and the Rules framed by the State Government. Being bound by the legislative prescriptions in holding of elections, necessary notifications under Sec.10 and 11 of the Gujarat Panchayats Act, 1993 are awaited from the State Government before State Election Commission could proceed ahead."

Copies of various letters written by the Commission to the State Government in the Panchayats Department from 18.3.2004 onwards are also produced with the affidavit.

5. In the meantime, from 1st August to 12th August, 2005, the State Government issued notifications under Sections 10 and 11 of the Act determining the number of seats in various taluka panchayats and district panchayats and the seats reserved for different categories. On 10th and 12th August 2005, the State

Government issued notifications converting 60 gram panchayats into municipal boroughs (nagar palikas) on the ground that as per the 2001 census figures the population of those areas had exceeded 15000 each and, therefore, they were required to be converted into municipal boroughs.

In view of the said development in the additional affidavit filed on behalf of the Commission on 23.8.2005, it was stated that since the State Government had issued notifications dated 10th/12th August 2005, converting certain gram panchayats into municipal boroughs in various talukas and districts of the State, the State Election Commission will be in a position to complete the entire election process in respect of 23 district panchayats and 209 taluka panchayats by the third week of May 2006.

SUBMISSIONS ON BEHALF OF THE PETITIONERS

6. When the petition reached hearing on 27th September 2005, it was urged on behalf of the petitioners that in view of the constitutional mandate enshrined in Article 243E(3)(a) and also in Section 15(1) (first proviso) of the Gujarat Panchayats Act, 1993 ("the Act" for brevity), the elections were required to be held before 5th/11th October 2005 or even earlier and, therefore, a writ of mandamus or at least interim directions were called for. It was also contended that the present petitions were filed in May 2005 just as SCA No.9847 of 2005 for timely elections to the Ahmedabad Municipal Corporation was also filed in May 2005, where the Hon'ble Supreme Court passed interim order on 13th September 2005 directing the Election Commission to complete the elections within the constitutionally ordained time limit in Article 243U(3)(a).

SUBMISSIONS ON BEHALF OF THE AUTHORITIES

7. On the other hand, Mr SN Shelat, learned Advocate General appearing for the State Election Commission, Mr Kamal B Trivedi, learned Addl. Advocate General for the State of Gujarat and Mr AD Oza, learned Government Pleader appearing for the Delimitation Commission, had submitted that in the case of Ahmedabad Municipal Corporation, there was mere delimitation of wards by change of the boundaries of existing wards. But, in the present case, as many as 60 gram panchayats have been converted into municipal boroughs in view of the increase in their population as recorded in the 2001 census figures. It was submitted that as per the provisions of clause (f) of Article 243, "population" means the population as ascertained at the last preceding census of which the relevant figures have been published. The relevant figures were published in 2004. As per the provisions of Section 7(1) of the Gujarat Panchayats Act, 1993, the gram panchayat is to be constituted for a local area comprising of a revenue village or a group of revenue villages or hamlets, where the population of such local area does not exceed fifteen thousand. On the basis of the 2001 census figures, it transpired that 60 gram panchayats are to be converted into municipal boroughs. As per the provisions of Section 266B of the Gujarat Municipalities Act, 1963 such notifications were already issued on 10th/12th August 2005. It was, therefore, submitted that since such areas converted from gram panchayats into municipal boroughs are located in most of the districts of the State, those areas are required to be excluded from the areas of the respective taluka panchayats and also district panchayats and, therefore, the entire exercise of delimitation of wards for elections to the taluka panchayats and district panchayats has to be undertaken.

Looking to the number of those panchayats – 23 district panchayats and 209 taluka panchayats – it is going to be a herculean task for delimiting the wards in all those district panchayats and taluka panchayats and at least six months' time will be required for completing this exercise. It was further submitted that since the 2001 census figures were already published in 2004 the delimitation process has already commenced, the elections to the district panchayats and taluka panchayats are required to be conducted on that basis in view of the various constitutional and statutory provisions.

INTERIM ORDER DATED 27th SEPTEMBER 2005

8. In view of our decision dated 21st September 2005 in Special Civil Application No. 19047 of 2005 holding that the time limits stipulated in Articles 243E(3) and 243U(3) are not merely mandatory, but also peremptory, after hearing the learned Advocate General for the State Election Commission, learned Addl. Advocate General for the State Government and the learned Government Pleader for the Delimitation Commission, by our order dated 27th September 2005 we called upon the State Election Commission to indicate the earliest date by which the elections to the District Panchayats and Taluka Panchayats could be completed in October, 2005. That date was indicated as 28th October 2005 and we accordingly passed interim orders on 27th September 2005 recording that the elections to the District Panchayats and Taluka Panchayats in the State will be completed by 28th October 2005. We also granted interim stay of operation of the notifications dated 10th and 12th August 2005, by which 60 gram panchayats were converted into municipal boroughs and the consequential orders passed by the State Government, making it clear that the stay was to operate only for the purpose

of holding elections to the concerned Taluka Panchayats and the District Panchayats, meaning thereby, those areas were not to be treated as excluded from the respective Taluka Panchayats and District Panchayats while holding elections in October 2005. We also observed that elections could be held on the basis of voters' lists revised in 2004 and for the constituencies determined on the basis of 1991 census.

PLEA FOR RECONSIDERATION

9. Civil Application No. 9030 of 2005 has been filed by a resident of Bodakdev area, who was the Sarpanch of the erstwhile Bodakdev Gram Panchayat before the said area was converted from a gram panchayat into a municipal borough(nagarpalika) by Government of Gujarat notification dated 10th August 2005. The applicant has prayed for joining him as a party (which prayer has been granted by a separate order) and for recalling and modifying our order dated 27th September 2005 in the main petition and has prayed for a direction that the competent authorities be directed to first complete the exercise of delimitation of the wards keeping in mind the 2001 census figures within such time frame as may be fixed by this Court and that the elections of the panchayats to be held within one month thereafter or such period as may be fixed by this Court.

10. Before issuance of the notification dated 10th August 2005, Bodakdev was a part of the Daskroi Taluka in Ahmedabad district. The elections to the Daskroi Taluka Panchayat were last held in September 2000 and its five year term is to expire on 8th October 2005. In view of the mandate of Article 243E(3)(a) the elections to the Daskroi Taluka Panchayat are required to be held before the expiry

of its duration i.e before 8th October 2005. Similarly elections to the other 208 Taluka Panchayats and 23 District Panchayats in the State are required to be held and completed by dates falling between 5th and 11th October 2005.

11. As per the provisions of the first proviso to sub-section (1) of Section 15 of the Gujarat Panchayats Act 1993, the elections of members of a Panchayat are required to be held within the following time limit:-

> **15. Election**.- (1) The election of members to a panchayat shall be held on such date as State Election Commission may appoint in this behalf :
>
> Provided that -
>
> (i) in the case of reconstitution of a panchayat on account of the expiry of its duration of five years such date shall not be earlier than two months or later than fifteen days before the expiry of the duration.

In view of the above statutory provisions the elections to the Daskroi Taluka Panchayat were required to be held by 23rd September 2005. The elections to the said Taluka Panchayat, Ahmedabad District Panchayat and also elections to all other District Panchayats (23 in number) and Taluka Panchayats (209 in number) in the State became due 15 days before expiry of the five year term i.e latest by 20th to 26th September, 2005.

12. Mr Mihir Joshi, learned counsel for the applicant in Civil Application No. 9030 of 2005 vehemently submitted that while the time limits stipulated in the aforesaid constitutional and statutory provisions are not unimportant, holding elections after delimitation exercise undertaken on the basis of 2001 census figures providing for equal representation by redistribution of the wards is more important

than meeting with the constitutional or the statutory deadlines for holding elections to Taluka Panchayats and District Panchayats. Strong reliance is placed on the decisions of the Apex Court in **In Re Presidential Poll, (1974) 2 SCC 33 and in Atma Singh vs. State of Punjab, (1981) 2 SCC 657 and in State of Maharashtra vs. Jalgaon Municipal Council (2003) 9 SCC 731.**

13. Mr Vijay Patel appearing for a former ex-Sarpanch of Thaltej Gram Panchayat also supported the learned counsel for the ex-Sarpanch of the Bodakdev Gram Panchayat and contended that if the interim orders are not modified, complications are likely to arise in future. When the notifications dated 10th/12th August 2005 will operate, in view of Section 264 of the Act, a person elected as a member of a Taluka Panchayat or a District Panchayat may cease to hold the office as a member in that panchayat if the area which elected him is excluded from the respective Taluka Panchayat / District Panchayat.

14. In view of the importance of the issues raised in the petitions as well as in the Civil Application and also the urgency involved, with the consent of the learned counsel for the parties, we took up the matters for final hearing.

CONSTITUTIONAL PROVISIONS

15. **243. Definitions –** In this Part, unless the context otherwise requires,-

(d) 'Panchayat" means an institution (by whatever name called) of self-government constituted under article 243B, for the rural areas;

(e) 'Panchayat area' means the territorial area of a Panchayat;

(f) 'population' means the population as ascertained at the last preceding

census of which the relevant figures have been published.

243B. Constitution of Panchayats.- (1) There shall be constituted in every State, Panchayats at the village, intermediate and district levels in accordance with the provisions of this Part.

(2) ... ...

243C. Composition of Panchayats.- (1) Subject to the provisions of this Part, the Legislature of a State may,. By law, make provisions with respect to the composition of Panchayats:

Provided that the ratio between the population of the territorial area of a Panchayat at any level and the number of seats in such Panchayat to be filled by election shall, so far as practicable, be the same throughout the State,

(2) All the seats in a Panchayat shall be filled by persons chosen by direct election from territorial constituencies in the Panchayat area and, for this purpose, each Panchayat area shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the member of seats allotted to it shall, so far as practicable, be the same throughout the Panchayat area.

(3) to (5) ... ...

Article 243D provides for reservation of seats in favour of Scheduled Castes and Scheduled Tribes in proportion to their population in the concerned panchayat area and also for women belonging to the reserved categories to the extent of one-third of the total number of seats reserved for Scheduled Castes or, as the case may be, Scheduled Tribes. The same Article also provides for reservation in favour of women to the extent of one-third of the total number seats to be filled in by direct election in every panchayat.

243E. Duration of Panchayats, etc.

(1) Every Panchayat, unless sooner dissolved under any law for th time being in force, shall continue for five years from the date appointed for its first meeting and no longer.

(2) ... ...

(3) An election to constitute a Panchayat shall be completed -

(a) before the expiry of its duration specified in clause (1);

(b) before the expiration of a period of six months from the date of its dissolution:

Provided that where the remainder of the period for which the dissolved Panchayat would have continued is less than six months, it shall not be necessary to hold any election under this clause for constituting the Panchayat.

(4) A Panchayat constituted upon the dissolution of a Panchayat before the expiration of its duration shall continue only for the remainder of the period for which the dissolved Panchayat would have continued under clause (1), had it not been so dissolved.

243K. Elections to the Panchayats.- The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be vested in a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor.

(2) ... ...

(3) ... ...

(4) Subject to the provisions of this Constitution, the Legislature of a State may, by law, make provision with respect to all matters relating to, or in connection with, elections to the Panchayats.

Article 243N give overriding effect to the provisions in Part IX of the Constitution over any existing law after a period of one year from the date of coming into force of these provisions.

243O. Bar to inference by Courts in electoral matters.- Notwithstanding anything contained in this Constitution-

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies made or purporting to be made under article 243K, shall not be called in question in any Court;

(b) no election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any Law made by the legislature of a State.

There are similar provisions in Part IX-A of the Constitution in relation to the Municipalities for urban areas or for an area in transition from a rural area to an urban area (including Article 243U for duration of municipalities and stipulating time limit for completing elections).

DISCUSSION ON THE NATURE OF TIME LIMIT FOR HOLDING ELECTIONS

16. On a bare perusal of the provisions of clause (1) of Article 243E, it is clear that unless sooner dissolved under any law, every panchayat shall continue for "five years from the date appointed for its first meeting and **no longer**". Hence, under no circumstances, the panchayat can continue even for one day beyond its term of five years from the date appointed for its first meeting. Clause (3) of Article 243E stipulates the period to complete the election to constitute a

panchayat - "before the expiry of its duration specified in clause (1)". Hence, the emphasis in the words "and no longer" in clause (1) is also carried forward in clause (3)(a) of that Article to mean that "an election to constitute a panchayat shall be completed before the expiry of five years from the date appointed for its first meeting and no later".

17.0 OBJECTS & REASONS FOR INSERTING PARTS IX AND IX-A IN CONSTITUTION

17.1 In the Statement of Objects and Reasons of the Constitutional Amendment Bill introducing Part IX in the Constitution in relation to panchayats, it was stated as under :-

> "Though the panchayati Raj Institutions have been in existence for a long time, it has been observed that these institutions have not been able to acquire the status and dignity of viable and responsive people's bodies due to a number of reasons including absence of regular elections, prolonged supersessions, insufficient representation of weaker sections like Scheduled Castes, Scheduled Tribes and woken, inadequate devolution of powers and lack of financial resources.
>
> ... ... In the light of the experience of the last forty years and in view of the short-comings which have been observed, it is considered that there is an imperative need to enshrine in the Constitution certain basic and essential features of Panchayati Raj Institutions to impart certainty, **continuity** and strength to them.
>
> Accordingly, it was provided to add a new part relating to panchayats in the Constitution to provide for among other things, ... fixing tenure of 5 years for Panchayats; and holding elections within a period of six months in the event of supersession of any Panchayat; ... ..."

17.2 Similarly, in the Statement of Objects and Reasons mentioned in the Bill for Constitution (74th Amendment) Act in relation to Municipalities, it was mentioned as under :-

> "In many States local bodies have become weak and ineffective on account of a variety of reasons, including the failure to hold regular elections, prolonged suppression and inadequate devolution in powers and functions. As a result, Urban and Local Bodies are not able to perform effectively as vibrant democratic units of self-Government.
>
> Having regard to these inadequacies, it was considered necessary that provisions relating to Urban Local Bodies are incorporated in the Constitution particularly, for -
>
> (i) ... ...
>
> (ii) ensuring regular conduct of elections;
>
> (iii) ensuring timely elections in case of supersession; and
>
> (iv) providing adequate representation for the weaker sections and Scheduled Castes, Scheduled Tribes and women.
>
> Accordingly, it has been proposed to add a new part relating to the Urban Local Bodies in the constitution to provide for -
>
> (f) fixed tenure of 5 years for the Municipality and re-election within a period of six months of its dissolution.

The said Amendment Acts came into force with effect from 23.4.1993 and 1.6.1993 respectively.

17.3 The aforesaid Statements of Objects and Reasons, therefore, clearly indicate that the Constitution makers intended certainty, continuity and strength to

impart the institutions of the local self-government. The very concept of continuity, therefore, presupposes that before the five year term of an elected body expires, its successor body must be elected. Hence, elections must be held before expiry of the five year term. It is only in case of supersession of an panchayat that the Constitution grants a period of six months for holding elections, obviously because supersession is something which cannot be anticipated in advance.

COMPARISON WITH OTHER CONSTITUTIONAL PROVISIONS STIPULATING TIME LIMITS FOR ELECTIONS

18. A comparison of the other provisions of the Constitution with Articles 243E and 243U also leads us to the the same conclusion. Articles 83 and 172 providing for the duration for the Parliament and State Legislatures also contain provisions for extension of their term due to the proclamation of emergency, but no such contingency is contemplated in case of local authorities either in Part IX or in Part IX-A of the Constitution.

19. Similarly, a comparison with the provisions of Articles 54, 56(1) and 62(1) for Presidential elections buttresses our conclusion.

19.1 **54. Election to President.-** The President shall be elected by the members of an electoral college consisting of -

(a) the elected members of both Houses of Parliament; and

(b) the elected members of the Legislative Assemblies of the States.

56. Term of office of President.- (1) The President shall hold office for a term of five years from the date on which he enters upon his office :

Provided that -

(a) ... ...
(b) ... ...

(c) the President shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

(2) ... .

62. Time of holding election to fill vacancy in the office of President and the term of office of person elected to fill casual vacancy.- (1) An election to fill a vacancy caused by the expiration of the term of office of President shall be completed before the expiration of the term.

(2) ... ...

19.2 The aforesaid provisions came up for consideration before a Bench of seven learned Judges of the Apex Court in **Dr Narayan Bhaskar Khare vs. Election Commission of India, AIR 1957 SC 694 (1957 SCR 1081)**. When the date of polling was fixed for the election of the President, a petition was filed to direct the Election Commission not to proceed with the polling as elections had not taken place in Himachal Pradesh and in two constituencies of the State of Punjab. While dismissing the petition on the ground that elections to the office of President once held could be challenged in an election petition under Article 71 of the Constitution, the Apex Court made the following observations:-

"Article 62(1) peremptorily requires that the election to fill the vacancy caused by the expiration of the term of office of the President shall be completed before the expiration of the term. It is necessary to bear in mind this clear mandatory provision of the Constitution."

19.3 After the aforesaid decision in the case of Narayan Bhaskar Khare

(Supra), out of abundant caution, the Constitution was amended by Constitution (11th Amendment) Act, 1964 for introducing clause (4) in Article 71 to read as under :-

> "71(4) The election of a person as President or Vice-President shall not be called in question on the ground of the existence of any vacancy for whatever reasons among the members of the electoral college electing him."

19.4 Again the same debate came up before the Hon'ble Supreme Court in its advisory jurisdiction in **Re Presidential Poll, (1974) 2 SCC 33**. The election was required to be held to the office of the President before the expiration of the term. However, at the relevant time, the Legislative Assembly of the State of Gujarat was dissolved. One of the questions referred for the opinion of the Hon'ble Supreme Court was as under :-

> "(5) Where the Legislative Assembly or Assemblies of any State or States is or are dissolved before the expiration of the terms of office of the outgoing President under Article 56(1) of the Constitution of India, how and when is the election to fill the vacancy in the office of President to be held and completed on a correct interpretation of the Constitution of India to make the Constitution of India workable regarding the office of President."

Some of the parties contended that the observations in Dr Khare's case were obiter, but after considering the relevant Constitutional provisions [and independently of Article 71(4)], the Hon'ble Supreme Court reiterated its view in the case of Dr Narayan Bhaskar Khare (Supra) in the following terms :-

> 4. The fixed term of office mentioned in Article 56(1) as well as the mandate in Article 62(1) that the election to fill a vacancy caused by the

> expiration of the term of office shall be completed before the expiration of the term reflects the dominant constitutional purpose and intent regarding the time when the election of the President is to be held. .. ..
>
> 5. The completion of election before the expiration of the term in the case of vacancy caused by the expiry of the term as well as filling the vacancy by holding an election not alter than six months from the date of occurrence of the vacancy in the other case does not contain any provision for extension of time. By way of contrast reference may be made to Article 83 where it is said that though the expiration of the period of five years shall operate as a dissolution of the House the period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate."
>
> (emphasis supplied)

19.5 The Apex Court reached this conclusion notwithstanding the provisions of sub-clause (c) in the proviso to clause (1) of Article 51 which permits a President to continue to hold his office notwithstanding the expiration of his term, until his successor enters upon his office. The Court explained Article 56(1)(c) by observing that the successor can only enter upon his office after he takes the oath under Article 60. He can take oath only after the election. It is possible that the successor cannot enter upon his office on the date following the expiration of the term of office of the outgoing President for unavoidable reasons. That does not detract from the constitutional intent and content that the election to fill vacancy because of the expiry of the term of the President is to be completed before the expiration of the term.

19.6 Rejecting the argument that since the electoral college consists of elected members of State Assemblies, in view of dissolution of the Legislative

Assembly of a State, the electoral college is not complete and elections to the office of the President cannot be held in absence of the full electoral college, the Court made the following observations :-

> "It will not only be undemocratic but also unconstitutional to deny the elected members of both the Houses of Parliament as well as the elected members of the Legislative Assemblies of the States the right to elect the President in accordance with the provisions of the Constitution only because the Assembly of a State is dissolved. ... ..."
>
> (emphasis supplied)

19.7 Reference to Article 71(4) was made only as an additional prop, but mainstay of the above decision was the language of Articles 56(1) and 62(1) themselves which correspond to clause (1) and sub-clause (a) of clause (3) of Article 243E in the case of panchayats and Article 243U in case of municipalities. The Apex Court treated Article 71(4) as a mere codification of the view already taken by Das, CJ in Narayan Bhaskar Khare's case (Supra).

19.8 A comparative analysis of the provisions of Article 243E and Article 243U on the one hand and the provisions of Articles 56(1) and 62(1) of the Constitution in relation to the election to the office of the President on the other hand makes it clear beyond any shadow of doubt that elections to panchayats and municipalities have to be held before expiry of their five year term. Thus the time limit is both mandatory and peremptory.

THE VIEW TAKEN BY THIS COURT EARLIER

20. A Division Bench of this Court speaking through Hon'ble the Chief Justice Mr Justice BN Kirpal (as His Lordship then was), interpreting the

provisions in Parts IX-A and IX of the Constitution, enunciated the following principles which apply on all fours to the present case also :-

> "44. It will be seen that the provisions of Part IX and Part IX-A do not contemplate any hiatus. The elections are required to be regularly held and the only time that an unelected body can exist is when it is superseded. Even then it is incumbent to hold the elections within six months of the supersession. Whereas under Art.83 and Art.172 the duration of the Parliament and the State Legislatures can be extended due to the Proclamation of Emergency, in the case of Local Authorities no such contingency is contemplated by Part IX or Part IX-A of the Constitution and election schedule has to adhere to the provisions of Art.243-E and Art.243-U of the Constitution. Therefore, any attempt on the part of the Executive or the State Legislature not to hold elections cannot be permitted.

21. In our judgment dated 21.9.2005 in Special Civil Application No. 19047 of 2005 in relation to elections to municipal corporations also, we have taken the same view and held that the time limits stipulated in clause (3) of Article 243E and clause (3) of Article 143U are both mandatory and peremptory.

SHIFTING THE FOCUS OF THE DEBATE

22. It is, however, contended by the learned counsel for the respondents that while the provisions of Articles 243E(3) and 243U(3) stipulating the time limits for holding elections to panchayats and municipalities are mandatory, the other provisions in Part IX and IX-A of the Constitution are also mandatory. It is submitted that the very fact that the same Constitution provides in Article 243(f) and 243P(g) that population means population as ascertained at the last preceding census of which the relevant figures have been published and Articles 243O(a) and

243ZG(a) themselves confer immunity from judicial review on laws relating to the delimitation of constituencies and the allotment of seats to such constituencies to be made by th State legislature and Articles 243D and Article 243T themselves provide for reservation of seats for Scheduled Castes, Scheduled Tribes and for women in proportion to the population of these castes and tribes in the area and these articles also provide for reservation of 1/3rd number of seats for women – is enough indication that the Constitution attaches as much importance to the proportionate reservation for Scheduled Castes and Scheduled Tribes and also reservation for women and also to the delimitation of constituencies, as the Constitution gives to the time limits for holding elections. It is, therefore, submitted that focusing only on the time limits for holding the elections may not be allowed to work to the detriment of the other important facets of democracy such as delimitation of constituencies necessary for implementing the principle of equal representation. It is vehemently submitted by Mr Mihir Joshi for respondent No.3 that a job well done but some what late is more important than a job not so well done within the stipulated time limit.

23. It is contended on the basis of the decision of the Apex Court in **State of Maharashtra vs. Jalgaon Municipal Council, (2003) 9 SCC 731** that the time limit stipulated in Article 243U cannot be applied where the area of one description is converted into an area of another description. When the Bodakdev Gram Panchayat is converted into Bodakdev Municipal Borough, the consequent delay in elections to the Taluka Panchayat from which the Bodakdev Gram Panchayat is excluded cannot be stigmatized as violation of the constitutional provisions for timely holding the elections.

24. Great emphasis is placed on the importance of delimitation of constituencies on the basis of the decision **in Atma Singh vs. State of Punjab, (1981) 2 SCC 657 (paras 6 and 7)** for contending that when there is change in the limits of Taluka panchayat/ District panchayat, the State Government cannot proceed to hold elections to Panchayats without delimitation of the concerned Taluka panchayat/ District Panchayat into wards. The delimitation of wards, a delicate and important task, is entrusted to the State Election Commission under the provisions of sub-Sections (1), (2) and (3) of Section 16 of the Panchayats Act and therefore it is the duty of the State Election Commission to effect a redivision of a Taluka Panchayat or a District Panchayat from which any area is excluded. When a panchayat is reconstituted by exclusion of any area from the limits of the panchayat i.e when there is an alteration of the limits of a panchayat, there must of necessity be a division of the reconstituted Taluka panchayat / District panchayat into new wards without which the elections cannot be held.

25. It is also submitted that the whole purpose of delimitation of panchayats into wards is to ensure that every citizen should get a fair representation in the panchayats. Elections to Taluka Panchayats and District Panchayats were held in September 2000 for the wards determined on the basis of the 1991 census figures. Now that the 2001 census figures have become available, by virtue of the provisions of Article 243C read with Article 243(f) and as per the opinion of the Apex Court in **Re Presidential Poll (1974) 2 SCC 33** (Para 43), the forthcoming elections to the Taluka Panchayat and District Panchayat have to be held for wards (constituencies) which must be readjusted on the basis of the population distribution as found in the 2001 census figures which process has already commenced. Otherwise, every citizen will not get a fair representation in the

concerned Taluka panchayat/ District Panchayat. If elections are held for constituencies on the basis of the 1991 census figures, there is a possibility of skewed representation and the whole concept of equal representation or fair representation will be defeated.

26. It is further vehemently submitted by Mr Joshi for respondent No.3 that even if the Court finds that inaction or delay on the part of the State Government or the Election Commission in undertaking and completing the delimitation exercise was not bona fide, the Court can castigate the authorities for lapses on their part, but the Court cannot direct the authorities to overlook the other provisions in the Constitution, when the Constitution and the Panchayats Act provide for delimitation of constituencies upon alteration of the limits of a Taluka Panchayat/ District Panchayat and also upon availability of latest census figures. It is submitted that both the issues are separate and ought to be dealt with as two separate and independent issues –

(i) the inaction or delay on the part of the authorities in taking the necessary steps for timely completion of the election process, and

(ii) the necessity of implementing the provisions for delimitation of constituencies, revision of electoral rolls and all the other processes which provide a fair representation to every citizen.

DISCUSSION – DELIMITATION & DEADLINE FOR ELECTION

27. On perusal of the various provisions in Part IX and IX-A of the Constitution, it is clear that the Constitution has cast an obligation to complete elections to Panchayats and the Municipalities before expiry of the duration of five years from the date appointed for the first meeting. All the provisions in Part IX in relation to panchayats are required to be read harmoniously. There can be no manner of doubt that all the authorities concerned with the determination of number of seats in panchayats and similarly the authorities determining the number of seats to be reserved for Scheduled Castes, Scheduled Tribes and women and the authorities for delimiting the wards as well as the authorities entrusted with the task of revision of electoral rolls are required to keep in mind the mandate enshrined in Article 243E(3) of the Constitution. While the Constitution specifically vests the superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to panchayats and municipalities in the State Election Commission, it does not at all mean that the other authorities who are entrusted with the task of taking any preliminary steps prior to the Election Commission swinging into action, are not to obey the mandate contained in Article 243E(3) and 243U(3) of the Constitution. The Constitution does not intend, and could not have intended, that if any authorities other than the State Election Commission are not vigilant in the timely performance of their functions, then the State Election Commission must watch the scene as a mute and helpless spectator and cannot swing into action till the other authorities choose to issue necessary notifications as preliminary steps before the State Election Commission can commence the election process. Since the time limits stipulated in the provisions of Article 243E(3) and 243U(3) are both

mandatory and peremptory, the State Election Commission must start taking all the necessary steps and the heavy responsibility cast on the shoulders of the State Election Commission even requires the Commission to request, remind, caution and alert the State Government and other authorities for taking timely action to see that all the preliminary steps are taken with utmost expedition so that the State Election Commission can then commence election process within the time limit stipulated in the constitutional provisions and also in the statutory provisions like Section 15 of the Panchayats Act.

28. In our decision dated 21.9.2005, we have gone so far to observe that if the other constitutional and statutory authorities do not pay heed to such requests or reminders of the State Election Commission, there is nothing to prevent the State Election Commission from moving the Governor of the State or even moving this Court under Article 226 of the Constitution for ensuring due compliance with the provisions of clause (3) of Article 243E and clause (3) of Article 243U of the Constitution. It is necessary to remind the State Election Commission of its status, powers and duties to see that the institution of the State Election Commission is strengthened and that the State Government, Municipalities, Panchayats or other authorities do not take the liberty of timing their actions or decisions depending on their convenience or depending on the personality and temperament of the Election Commissioner.

29. Coming to the question of importance of delimitation exercise, there can be no gainsaying that delimitation of constituencies is certainly an important exercise where law requires such exercise to be undertaken before the actual election process commences. The question is not whether delimitation exercise is less

important than the time limit for holding elections, but the issue is - if there is inaction or delay on the part of the State Government or any other authority in taking the necessary steps in that behalf, does the time limit for conducting and completing elections stand automatically extended *pro tanto* so that beyond criticizing the State Government and other authorities for the inaction or delay on their part, all the other constitutional authorities including the State Election Commission and this Court should feel helpless and extend the time limit for conducting and completing elections.

30. The debate whether this Court should or should not enforce the time limit when it comes in the way of the people getting the right of fair representation upon delimitation exercise is required to be examined with reference to several aspects :-

I. CIRCUMSTANCES REQUIRING DELIMITATION AND THE IMPACT OF HOLDING ELECTIONS BEFORE UNDERTAKING DELIMITATION EXERCISE.

(a) Where there is change of status of a local body from one category to another and elections are to be held to that local body;

b) Where new areas are brought within the territorial limits of an existing local body

(c) Where any areas are taken out or excluded from the territorial limits of an existing local body

(d) Where the latest census figures are published;

Each of these four circumstances requires an elaborate discussion.

II. THE REASONS FOR THE DELAY/INACTION ON THE PART OF THE AUTHORITIES IN COMMENCING/ COMPLETING THE DELIMITATION EXERCISE OR ANY OTHER PRELIMINARY STEPS

When the delay in conducting and completing elections is attributable to natural calamities like floods, earthquake etc. then certainly the State Election Commission or the Courts would not insist on compliance with the time limit because the law does not compel one to do that which one cannot possibly perform. Where the Act of God prevents the compliance of the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God [Broom's Legal Maxims 10th Edition Pages 162 and 163 and Craies on Statute Law, 6th Edition Page 268 as referred to in Re Presidential Poll (Supra) (para 15)].

For instance, Section 7A of the Bombay Provincial Municipal Corporations Act, 1949 provides for appointment of an Administrator after expiry of normal term of office of councillors where due to unforeseen circumstances, such as natural calamities, riot, communal disturbances the election to constitute a municipal corporation can not be completed before the expiry of its duration.

Similarly, Section 257 of the Gujarat Panchayats Act, 1993 provides that where the State Government is satisfied that it is not possible to hold elections to Panchayat before expiry of duration for reconstituting the Panchayat on account of any natural calamity, the State Government may make a declaration to that effect and appoint an officer to exercise and perform all the powers and duties of the

Panchayat.

III. WHEN HAS THE PETITIONER MOVED THE COURT FOR MANDAMUS FOR TIMELY ELECTIONS TO A LOCAL BODY ?

Where the petitioner has moved the Court within time for a writ of mandamus to direct the authorities to hold elections within the time limit stipulated in the relevant constitutional and statutory provisions, but the authorities remained inactive during the time consumed by litigation, the Court may require the Election Commission to conduct the elections within the time limit even if the concerned authority has not undertaken or completed the delimitation exercise.

For instance, in the case of Ahmedabad Municipal Corporation filed before the High Court in May 2005, the Apex Court gave interim directions to the State Election Commission to complete the elections within the stipulated time limit of 15th October 2005, even though it meant that the Commission had to hold elections for the constituencies determined on the basis of 1991 census.

On the other hand, if there is delay on the part of the petitioner in moving the Court and the petition is filed at the last moment, the Court may decline to exercise its jurisdiction. For instance, in Special Civil Application No.19047 of 2005 seeking a writ of mandamus for timely completion of elections to five municipal corporations by 15th October 2005, we dismissed the petition by judgment dated 21st September 2005 because the petition was filed very recently on 16th September and that too after the State Government had already issued notifications on 8th June re-determining the number of wards and the number of reserved seats and the State Election Commission had already issued Delimitation Notifications dated 31st August 2005, and the revised voters' lists were to be

published on 29th September, 2005. We, therefore, permitted the State Election Commission to declare that the elections will be completed by 15th December 2005.

IV. ONUS ON THE AUTHORITIES

When constitutional provisions stipulate mandatory time limit for holding elections to an institution of local self-government and the petition is filed under Article 226 for a writ of mandamus, it is for the authorities including the State Government and the Election Commission to show what steps have been taken by them for timely completion of elections. It is, therefore, not at all necessary for the petitioner to allege, much less, to prove mala fides.

DIFFERENT CIRCUMSTACNES REQUIRING DELIMITATION

(a) DELIMITATION REQUIRED UPON CHANGE OF STATUS OF A LOCAL BODY

31. When a local area of one description is converted into an area of another description, delimitation of constituencies becomes necessary and, therefore, the time limits stipulated in Article 243E(3) and 243U(3) do not apply. That is why the Apex Court has held in **State of Maharashtra vs. Jalgaon Municipal Council, (2003) 9 SCC 731** that where a municipal council is converted into a municipal corporation, there is bound to be hiatus between the date on which the area ceases to be a municipal council and the date on which the newly formed municipal corporation is constituted. The aforesaid time limit, therefore, applies only where the duration of the same type of local body comes to an end and the same type of successor local body is to take over as a consequence of the term of the previous

local body coming to an end. It is only where there is a change in the status of a local body that the Election Commission cannot conduct election without undertaking the delimitation exercise for altering the territorial limits and for specifying the numbers of boundaries of wards; new rules, bye-laws etc. have to be framed.

Of course an attempt was made by Mr Joshi to contend that since 60 gram panchayats have been converted into municipal boroughs as per the Government notifications dated 10th /12th August 2005 there is a change of status and, therefore, the provisions of Article 243E(3), which is similar to Article 243U(3), will not apply.

The argument is misconceived. The present dispute is not about elections to the 60 municipal boroughs but the dispute is about time limit for elections to 209 taluka panchayats and 23 district panchayats of which the 60 gram panchayats are only a minuscule part. The principle laid down in Jalgaon Municipal Council's case would have applied if the entire area of a taluka had been converted into a local body of a different description like the municipal corporation. Since there is no change in the status of taluka panchayats and district panchayats themselves, reliance placed by the learned counsel for the respondents on the Jalgaon Municipal Council case is misconceived.

(b) DELIMITATION REQUIRED WHEN NEW AREAS ARE BROUGHT WITHIN THE TERRITORIAL LIMITS OF AN EXISTING BODY

32. When new areas are included in a local body (panchayat or municipality), the boundaries of a local body would necessarily be extended and, therefore, the boundaries of the wards in a local body will have to be re-determined and naturally new electoral rolls for the wards would also be required to be prepared.

In such an eventuality, the principle laid down by the Apex Court in **Atma Singh vs. State of Punjab, (1981) 2 SCC 657** will apply. The Apex Court held therein that when the municipality is re-constituted by inclusion of any local area within the limits of a municipality, there must of necessity be a division of the reconstituted municipality into new wards without which the elections cannot be held. In the case of inclusion of any area within the limits of a municipality, the residents of the newly added area become eligible to be enrolled as voters and any election held without including them in the voters' list, would deprive them not only of their valuable right to vote at the election, but also of the right to contest as a candidate at such election.

This was the reason why we declined to issue a writ of mandamus to the State Election Commission for timely completion of the elections to the Vadodara Municipal Corporation because it was brought to our notice that the territorial limits of Vadodara Municipal Corporation were increased from 108 sq.kms to 149 sq.kms by inclusion of nine villages within the limits of Vadodara Municipal Corporation by notification dated 1st August 2002 and the delimitation notification

was issued by the State Election Commission on 31st August, 2005. Hence, by our judgment dated 21st September 2005 even after holding that the time limit stipulated in Article 243U(3) was mandatory and peremptory, we declined to exercise the discretionary jurisdiction under Article 226 of the Constitution both on the ground that the petition suffers from delay and also on the ground that a large number of people would be deprived of their right to vote and to contest at the election if elections were required to be held on the basis of old electoral rolls for constituencies which did not include the newly added areas with a large number of residents.

It is also pertinent to note that in **Atma Singh vs. State of Punjab (supra)** even after the Apex Court stressed upon the importance to be attached to the delimitation of Municipality into wards where new areas are added and even while criticizing the High Court for granting the stay order which resulted into depriving a large number of voters of their valuable right to participate in the elections, the Apex Court held that the decision of the State Government to hold the elections of the councillors on the basis of the existing limits of the Municipality before the deadline of 30th June 1979 stipulated in the amended proviso to sub-section (3) of Section 13 of the Punjab Act 2 of 1979 (which made it obligatory for the State Government to hold elections before June 30, 1979) was valid. Now that Article 243E(3) as well as Section 15 of the Gujarat Panchayats Act make it mandatory to hold the elections before completion of the five year term, in view of the inaction on the part of the respondent-authorities in not taking the timely action, this Court was left with no other alternative but to call upon the State Election Commission to conduct and complete the elections in October 2005. The decision in **Atma Singh vs. State of Punjab**, therefore, even after indicating the significance of

delimitation of constituencies does go to show that the election completed before the deadline was a valid election notwithstanding the fact that the residents in the newly added area could not exercise their franchise on account of the stay granted by the High Court. As explained in this judgment, the stay granted by this Court on 27.9.2005 in the present proceedings and being continued by this judgment till the territorial limits of the 60 municipal boroughs are determined and electoral rolls for those areas are prepared, does not deprive any citizen of his right to franchise but preserves his present right to exercise franchise without taking away his right to exercise franchise at the time of elections to the municipal boroughs in future.

(c) DELIMITATION REQUIRED UPON EXCLUSION OF AREA FROM THE TERRITORIAL LIMITS OF A LOCAL BODY

33. Different considerations, however, arise when an area is excluded from a panchayat and the elections are delayed on the ground that wards in the panchayat are required to be re-determined after excluding such area.

Here also, while ordinarily the elections should be held after the limits of the panchayat are re-determined by giving effect to the exclusion of the particular area, the question of holding elections within the constitutionally mandated time limit or at the earliest has to be decided with reference to the impact of exclusion of the area in question.

In the facts of the present case, the Court has found that conversion of 60 gram panchayats into municipal boroughs as per Government notification dated 10th/ 12th August 2005 affects only 39 out of 209 talukas required to go to polls in

October 2005. Even out of those 39 talukas, there are only 4 talukas where the number of gram panchayats being converted into municipal boroughs is three or more. In other words, elections to 205 talukas out of 209 talukas are not going to be affected on the ground of certain villages going out of the territorial limits of a taluka panchayat. The impact of exclusion of those areas from the concerned districts is, therefore, even going to be more insignificant.

34. In any case, by our interim order dated 27th September 2005 we have held that elections to 209 taluka panchayats and 23 district panchayats shall be conducted in October 2005 without completing the delimitation exercise i.e. by not excluding those 60 areas from the respective taluka panchayats/ district panchayats for the purposes of elections in October 2005. The voters in these 60 areas would be able to participate in the elections to taluka panchayats as well as the district panchayats in October 2005 and also as and when the elections are held to these 60 municipal boroughs; which event is going to take place after a period of six months. In other words, the injunction is only to the effect that those 60 areas will still be treated as part of the respective taluka panchayats and district panchayats for the limited purpose of elections to be held in the taluka panchayat and district panchayat in October 2005 but there is no injunction or direction against taking necessary steps after October 2005 for demarcating the boundaries of 60 municipal boroughs, preparing electoral rolls for those 60 areas and then holding elections to those municipal boroughs and thereupon the provisions of Section 264 of the Panchayats Act would also come into play.

(d) DELIMITATION TO BE UNDERTAKEN WHEN THE LATEST CENSUS FIGURES ARE PUBLISHED

35. The fourth situation arises where the constitutional time limit stipulated in Article 243E(3) or 243U(3) will not be complied with, if the delimitation exercise pursuant to the availability of latest census figures is not undertaken or completed.

The learned counsel for the respondents have submitted that the object of fresh delimitation exercise to be undertaken upon availability of the latest census figures is to implement the principle that every person should have an equal vote. It is submitted that after the 1991 census, considerable changes must have taken place in the distribution of population in different wards and different villages of a taluka and, therefore, upon availability of 2001 census figures in 2004, delimitation exercise for re-determining the wards in each taluka is a logical corollary and that this Court should not insist for completion of elections for constituencies earmarked on the basis of 1991 census. Strong reliance has been placed on the opinion of the Apex Court in **In Re Presidential Poll, (1974) 2 SCC 33** and particularly on the following observations in para 43 :-

> "Now that the census figures of 1971 have been published, elections have to be held under Article 170 only after delimitation of the constituencies has been made in accordance with clauses (2) and (3) of Article 170."

36. It is true that in the above opinion, the Court held that since the census figures of 1971 were already published, the elections to the Gujarat State Legislative Assembly could not be held according to the electoral rolls prepared for the constituencies delimited on the basis of census of 1961. The above

observations were made in view of the language of clause (2) of Article 170 read with Explanation and clause (3) of Article 170 of the Constitution. The constitutional intent has, however, been made clear by amendment of the aforesaid provisions and, therefore, it is necessary to refer to the relevant provisions of Article 170 for elections to State legislatures which are in pari materia with the provisions of Article 82, for elections to Parliament which have also undergone amendment.

Article 170 interpreted in Re Presidential Poll as in force in 1974 read as under:-

> "170. Composition of the Legislative Assemblies -
>
> (1) Subject to the provisions of Article 333, the Legislative Assembly of each State shall consist of not more than five hundred, and not less than sixty members chosen by direct election from territorial constituencies in the State.
>
> (2) For the purposes of clause (1), each State shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it shall, so far as practicable, be the same throughout the State.
>
> Explanation – In this clause, the expression "population" means the population as ascertained at the last preceding census of which the relevant figures have been published.
>
> (3) Upon completion of each census, the total number of seats in the Legislative Assembly of each State and the division of each State into territorial constituencies shall be readjusted by such authority and in such manner as Parliament may by law determine:
>
> Provided that such readjustment shall not affect representation in the Legislative Assembly until the dissolution of the then existing Assembly."

(emphasis supplied)

37. It was while interpreting the aforesaid provisions that the Supreme Court expressed its opinion in **In Re Presidential Poll (supra)** as under:-

> "It is apparent and there is nothing in Section 10(4) of the 1972 Act to the contrary which enjoins the Election Commission to hold elections to the House of the People or the Legislative Assembly dissolved after the census of 1971 according to the electoral rolls prepared of the constituencies delimited on the basis of the census of 1961. It is evident that under clause (2) of Article 170 read with the Explanation and clause (3) of Article 170 elections to the Legislative Assembly after the relevant figures of the population of the last preceding census have been ascertained and published can only be held on the basis of the total number of seats in the Legislative Assembly of each State and the division of each State in territorial constituencies readjusted by the Election Commission under the 1972 Act. Now that the census figures of 1971 have been published elections have to be held under Article 170 only after delimitation of the constituencies has been made in accordance with clauses (2) and (3) of Article 170."

38. The provisions of Article 170 came to be amended by the Constitution (42nd Amendment Act, 1976) by inserting three provisos. For the purposes of the present controversy, we are concerned with insertion of the second proviso to clause (3) of Article 170. It is, therefore, necessary to quote the entire clause (3) as amended by insertion of the second proviso to appreciate the full impact of the amendment.

> "(3) Upon the completion of each census, the total number of seats in the Legislative Assembly of each State and the division of each State into territorial constituencies shall be readjusted by such authority and in such manner as Parliament may by law determine:
>
> Provided that such readjustment shall not affect representation in the Legislative Assembly until the dissolution of the then existing Assembly;

> Provided further that such readjustment shall take effect from such date as the President may, by order, specify and until such readjustment takes effect, any election to the Legislative Assembly may be held on the basis of the territorial constituencies existing before such readjustment;"
>
> (underlined words added by the 42nd Amendment)

This amendment and similar amendment to Article 82 of the Constitution for elections to Parliament are thus made in order to provide that elections need not wait for the delimitation of constituencies and reallocation of seats as a result of a census, but that such readjustment and reallocation would henceforth take effect only from such date as may be specified by the President.

The other two provisos added by the Constitution (42nd Amendment) Act, 1976 and subsequent amendments thereto in 2001 and 2003 are not required to be quoted or discussed in this judgment, but these amendments read along with the insertion of the second proviso to clause (3) as quoted hereinabove do indicate that the constitution makers have realised that delimitation is a very time consuming process and, therefore, mere publication of the last census figures is not to automatically result into re-adjustment of the number of seats in the Legislative Assembly or readjustment of the territorial constituencies in the State. The 42nd Amendment also makes it clear that the readjustment will take effect from such date as may be specified by the President and that until such readjustment takes effect, any election to the Legislative Assembly may be held on the basis of the territorial constituencies existing before such readjustment. The constitutional intent is, therefore, crystal clear that elections are not to be postponed merely because figures of the last census have been published.

39. A study of the above constitutional amendments, therefore, makes it clear that the view which appealed to the Apex Court while expressing the opinion in **Re Presidential Poll** vis-a-vis Article 170 has not been accepted by the constitution makers and the constitution makers have thus given more importance to early completion of elections rather than holding elections for constituencies to be re-adjusted on the basis of the last census figures, which is a highly time consuming process.

40. While placing the aforesaid interpretation on the amended provisions of Article 170, we have also taken into consideration the submission made by the learned counsel for the petitioner that the rule - "one person one vote" i.e every citizen should get a fair representation in the local body is so important that in absence of delimitation upon publication of latest census figures, skewed distribution of population in different wards will defeat this principle. On behalf of the respondents reliance is placed on the provisions of sub-sections (1), (2) and (3) of Section 16 that electoral revisions which provide that a single member territorial constituencies shall be prepared in such a manner that the population of all the territorial constituencies is as far as practicable, the same.

40.1 As regards the above submission, it is necessary to note that the relevant provisions in Article 170 of the Constitution and in the Panchayats Act use the words, "as far as practicable". The Apex Court observed in para 26 of the opinion in **Re Presidential Poll, (1974) 2 SCC 33**, that the words "as far as practicable" indicate that in practice the scale of representation may not be uniform. The question was elaborately considered by another Constitution

Bench of the Apex Court in **RC Poudyal vs. Union of India, 1994 Supp. (1) SCC 324,** where after referring to the provisions of clause (2) of Article 170 providing for division of each State into territorial constituencies in such manner that ratio between the population in each constituency and the number of seats allotted to it shall, so far as practicable, be the same throughout the State, and after referring to the Explanation that the expression "population" in this case means the population as ascertained in the last preceding census of which the relevant figures have been published, the Apex Court made the following pertinent observations in para 108 after considering several decisions of the American Supreme Court and various treatises :-

> "108. This provision incorporates the rule of 'fair and effective representation'. Though the rule 'one person one vote' is a broad principle of democracy, it is more a declaration of a political ideal than a mandate for enforcement with arithmetical accuracy. These are the usual problems that arise in the delimitation of constituencies. In what is called 'First-past-the-post' system of elections, the variations in the size and in the voting populations of different consistencies, detract from a strict achievement of this ideal. The system has the merit of preponderance of "decisiveness" over "representativeness".
>
> [emphasis supplied]

41. It is thus clear that this Court would not allow postponement of elections to a local body or any legislature for the avowed purpose of enforcement of the rule of fair and effective representation as contended by the petitioners. This is not to say that the argument about skewed distribution of population is never relevant. In a given case when the Court is called upon to exercise its discretion, while exercising jurisdiction under Article 226 of the Constitution, it may weigh with the Court as one of the several relevant factors. For instance, one of the grounds which appealed to us for declining to issue a writ of mandamus to the State Election

Commission for holding timely elections to the Surat Municipal Corporation was the fact that on account of high rate of migration to Surat city such a situation had arisen there that the population in Surat has gone up from 14.98 lacs as per 1991 census to 24.33 lacs as per 2001 census and that prior to delimitation of wards which was effected on 31st August 2005, there was such a skewed distribution that in one ward in Surat the population was 36,321 whereas in another ward in the same city, the population was 1,51,474. It was in such circumstances that, apart from the ground of delay on the part of the petitioner in moving this Court, we declined to direct the State Election Commission to hold elections in Surat Municipal Corporation for the constituencies determined on the basis of 1991 census figures, merely in order to ensure that the elections are completed in October 2005.

42. However, in the facts of the present case none of the respondents have pointed out any facts which could dissuade the Court from issuing a writ of mandmus on the ground of alleged skewed distribution of population where the Apex Court has already cautioned the Courts in **RC Poudyal vs. Union of India, 1994 Supp (1) SCC 324.** Even otherwise, as per the provisions of sub-sections (2) and (3) of Section 16 of the Gujarat Panchayats Act, for election to a taluka panchayat each constituency has to be so delimited as to include therein as far as practicable whole wards of a village and one member shall be elected from each such constituency and similarly for elections to a district panchayat each territorial constituency has to be so delimited as to include therein as far as practicable whole constituency of a taluka and one member shall be elected from each such constituency.

Hence, even though Sections 10(4) and 11(4) provide for number of members of a taluka panchayat and a district panchayat respectively on the basis of the population of the taluka or the district, as the case may be, in view of the aforesaid provisions of sub-sections (2) and (3) of Section 16, either increase or decrease in the population of a village or of a taluka is not likely to result into any need for readjustment of the territories of different constituencies within a taluka or within a district. In any view of the matter, the village where population has exceeded the population of 15,000 as per 2001 census, such villages are to be converted into municipal boroughs. 60 such areas are to be converted from villages into municipal boroughs. Within a period of six months, elections are going to be held to such municipal boroughs. Hence, no useful purpose can be served by acceding to the request of the respondents to permit the authorities to readjust the number of seats and thereafter decreasing such seats when that population goes out of taluka panchayat and district panchayat. The likely increase in population from 1991 to 2001 is otherwise also likely to be offset by migration from rural areas to urban areas of which judicial notice has been taken in para 113 in the judgment in **RC Poudyal vs. Union of India, 1994 Suppl. (1) SCC 325 :-**

"The problem of the equality of the value of votes is further complicated by progressive rural depopulation and increasing urbanisation".

WHETHER THE AUTHORITIES HAVE DISCHARGED THE ONUS

43. As indicated in the earlier part of this judgment,the constitutional duty to hold elections before expiry of the time limit is so mandatory and peremptory that

heavy burden lies on any person or authority justifying non-compliance with the time limit or requesting for not issuing a writ of mandamus for timely completion of elections.

In the facts of this case, the State Election Commission went on requesting the State Government from 18th March 2004 onwards and also held several meetings with the State Government officials for requesting and reminding the State Government about steps required to be taken by the State Government so that thereafter the Election Commission can commence its statutory task of formation of electoral wards and preparation/revision of electoral rolls. No explanation is forthcoming from the State Government for the inaction from April 2004 onwards till the present petitions were filed and notice was issued by this Court on 1st June 2005. It was only thereafter that the State Government contended that the permission of the Delimitation Commission was required to be obtained for readjustment of boundaries of constituencies. Even this issue was highlighted by the State Election Commission in their letter dated 10th August 2004 (page 48 of the paper book) and at the meeting held on 19th July 2004 (item No.2) and at other meetings. The Commission was at pains to point out that even after issuance of notifications by the State Government under Sections 10 and 11 of the Gujarat Panchayats Act, the Commission would require considerable time for preparing and for redetermining the boundaries of electoral constituencies and for revision of rolls and that in absence of holding timely elections, the constitutional and legal complications could arise. As stated hereinabove, before June 2005 the State Government does not appear to have taken any steps for issuing the necessary notifications nor were any steps taken to convert 60 areas from gram panchayat into municipal boroughs upon their having population exceeding 15,000 as per the 2001 census figures which were already published in April 2004. Hence, the State

Government has not discharged the onus.

WHETHER THE PETITIONERS HAVE MOVED THIS COURT IN TIME ?

44. The petitioner Parishad had requested the State Government as far back as in February, 2005 to take all the necessary steps for timely completion of elections to panchayats. In March, 2004 the Minister for Panchayats replied that the necessary instructions were given to the Principal Secretary, Panchayats Department. In April, 2005, there were newspaper reports that elections will be completed in time. It was only when some uncertainty was raised in May, 2005 that the petitioners moved this Court on 22.5.2005 and on 1.6.2005 the learned Vacation Judge issued notice. There was, therefore, no delay on the part of the petitioners in moving this Court. In the case of the Ahmedabad Municipal Corporation also, the petition was filed in May, 2005 and the Apex Court by an interim order directed elections to be held by 15th October, 2005 so as to comply with the constitutional ordained time limit.

COMPLIANCE WITH STATUTORY PROVISIONS

45. The learned counsel for the respondents have, however, submitted that statutory authorities may not be directed not to act in accordance with the statutory provisions for delimitation because the Apex Court has held in **AC Jose vs. Sivan Pillai, AIR 1984 SC 921,** that the Election Commission has to act in accordance with the statutory provisions for preparation and publication of the voters' list and conduct of elections. In the aforesaid decision, the Apex Court has held as under: -

> "25. To sum up, therefore, the legal and constitutional position is as follows:

(a) when there is no Parliamentary legislation or rule made under the said legislation, the Commission is free to pass any orders in respect of the conduct of elections,

(b) where there is an Act and express Rules made thereunder, it is not open to the Commission to override the Act or the Rules and pass orders in direct disobedience to the mandate contained in the Act or the Rules. In other words, the powers of the Commission are meant to supplement rather than supplant the law (both statute and Rules) in the matter of superintendence, direction and control as provided by Art.324,

(c) where the Act or the Rules are silent, the Commission has no doubt plenary powers under Art.324 to give any direction in respect of the conduct of election, and

(d) where a particular direction by the Commission is submitted to the Government for approval, as required by the Rules, it is not open to the Commission to go ahead with the implementation of it at its own sweet will even if the approval of the Government is not given."

(emphasis supplied)

46. In the first place, we may, however, note that Article 243K(2) provides that the legislature of the State may by law make provision with respect of all matters relating to or in connection with election to the panchayats, "subject to the provisions of the constitution". In view of the above, all the provisions of the Gujarat Panchayats Act and the Rules made thereunder have to be read subject to the provisions of Article 243E, which provides for the mandatory time limit for completing elections to constitute panchayats.

47. **Provisions of Panchayats Act**

13. Duration of Panchayats and their reconstitution.-

(1) Every Panchayat, unless sooner dissolved under this Act shall continue for five years from the date appointed for its first meeting and no longer.

(2) An election to constitute a panchayat shall be completed-

(a) before the expiry of its duration specified in sub-section (1);

(b) before the expiration of a period of six months from the date of its dissolution :

14. Definitions – In this Chapter, unless the context otherwise requires -

(c) "qualifying date" means the 1st day of January of the year in which the list of voters for the purposes of the general election of members for constituting or reconstituting a panchayat is prepared under section 18 or, as the case may be, is revised under the proviso to section 23.

15. Election.- (1) The election of members to a panchayat shall be held on such date as State Election Commission may appoint in this behalf :

Provided that -

(i) in the case of reconstitution of a panchayat on account of the expiry of its duration of five years such date shall not be earlier than two months or later than fifteen days before the expiry of the duration.

Section 16(2) provides that for the purposes of elections of members to a taluka panchayat, a taluka shall be divided by the State Election Commission into as many single member territorial constituencies in such manner that the population of all the territorial constituencies is, as far as practicable, the same and each territorial constituency is so delimited as to include therein as far as

practicable whole wards of a village and one member shall be elected from each such constituency.

Sub-section (3) provides that for the purposes of elections of members to a district panchayat, a district shall be divided by the State Election Commission into as many single member territorial constituencies in such manner that the population of all the territorial constituencies is as far as practicable the same and each territorial constituency is so delimited as to include therein as far as practicable whole territorial constituencies of a taluka and one member shall be elected from each such constituency.

Sub-section (4) provides "that at any time not later than two months before the date of the expiry of the duration of a panchayat under section 13 ....., it shall be lawful for State Election Commission -

(a) ....

(b) to alter for reasons to be recorded in writing, the limits of any territorial constituency of the concerned taluka or district, for the purposes of general election in relation to a taluka or district panchayat".

Sub-section (5) provides that each territorial constituency constituted under sub-sections (2) and (3) shall subject to alteration, if any, made under sub-section (4) be an electoral division.

17. List of Voters for every electoral divisions.- For every electoral division, there shall be a list of voters which shall be prepared and maintained in accordance with the provisions of sections 18 to 22 under the superintendence, direction and control of the State Election Commission.

> **18. Preparation of list of voters.-** At any time not later than two months before the expiry of the duration of a panchayat under Section 13, ... there shall be prepared for the purpose of the general election of members for constituting or, as the case may be, reconstituting such panchayat, a list of voters for every electoral division in respect of such panchayat as determined under section 16 and in force at the time when such list is prepared.

Section 20 provides that the electoral roll of the Gujarat Legislative Assembly in the relevant electoral division shall be the list of voters for the electoral division, subject to any amendment, deletion or addition made under the said provision of the Act, but this section appears to deal with the amendment/deletion/addition of individual entries. Such list of voters for each electoral division prepared under Section 20 be published in the prescribed manner and shall come into operation immediately upon its final publication.

Section 23 provides that the list of voters for any electoral division which has been published and has come into operation under Section 20(7) shall remain in operation until a new list of voters for that electoral division is prepared, published and comes into operation and the proviso to this section deals with the contingency of a bye-election to fill a casual vacancy with which were are not concerned in this petition.

Under the provisions of the Gujarat Panchayats Act, the State Government has made the Gujarat Panchayat Election Rules, 1994 and as amended by the Amendment of 1995 Rules. The State Government has also made The Gujarat Taluka and District Panchayats Elections (Manner of Allotment of Reserved Seats by Rotation) Rules, 1994.

48. The provisions of Section 16(4) and 18 of the Gujarat Panchayats Act, 1993 specifically provide that altering the limits of any territorial constituency and revision of voters' list for an electoral division cannot take place at any time within two months before the expiry of the duration of a panchayat. Hence any notification issued after 8th August 2005 purporting to alter the limits of Daskroi taluka cannot have any legal sanctity for the purpose of holding elections to Daskroi taluka panchayat. Similarly, the notifications altering the limits of taluka panchayats or district panchayats could not have been issued and revision of electoral rolls for the panchayats cannot be undertaken after 5th/11th August, 2005 i.e which is the date two months prior to the date of expiry of all the taluka panchayats and district panchayats. Hence, there is no merit in the submission made on behalf of the respondents that it would be lawful for the State Election Commission to undertake the delimitation exercise and to revise the electoral rolls on the basis of the 2001 census figures. In fact, the provisions of the Panchayats Act themselves required the State Election Commission to hold elections to the panchayats latest by 28th September, 2005 i.e. 15 days prior to expiry of the duration of the present panchayats.

49. We may also refer to the provisions of Section 264 of the Gujarat Panchayats Act, 1993, which read as under:-

> 264. (1) When, on account of the constitution of a new district or taluka under the Land Revenue Code, or for any other reason, the limits of a district, or as the case may be, a taluka are, during the term of office of the members of the district panchayat or, as the case may be, the taluka panchayat, altered so as to -
>
> (a) include any area therein, or
> (b) exclude any area therefrom,

the State Government may, notwithstanding anything contained in this Act or any other law for the time being in force by order published in the Official Gazette, provide for all or any of the following matters, namely :-

(i) ....

(ii) in a case falling under clause (b), the interim reduction in the number of members of the district panchayat, or, as the case may be, the taluka panchayat and the termination of office of the elected members of the district panchayat or, as the case may be taluka panchayat who are elected as such members from the area so excluded ;

(iii) & (iv) ... .

(v) the removal of any difficulty which may arise on account of any change referred to in clause (a) or clause (b).

(2) the district panchayat or the taluka panchayat, if any, functioning immediately before the alteration of the limits shall, subject to the addition or exclusion of member under sub-section (1), continue to function until the expiry of its duration under this Act and on such expiry it shall be reconstituted in the manner provided in this Act."

... ...

As per the underlined provisions, when an area is excluded from a Taluka panchayat or a District Panchayat, only that member of a District Panchayat or the Taluka Panchayat will cease to hold the office <u>who was elected as a member from the area so excluded</u>. Hence, if a person is elected as a member of a District Panchayat by a constituency comprising of voters in one taluka, and out of several villages in that taluka if only one village or some villages are excluded for converting them into municipal boroughs, it would not mean that the member representing the entire taluka will cease to be a member of the District Panchayat. It is only if that entire taluka is excluded from that district that the provisions of

clause (ii) of Section 264(1) would be attracted. The provisions of sub-section (2) of Section 264 would be attracted in the present case in relation to exclusion of 60 areas after October 2005 when their areas are demarcated and elections will be held to those municipal boroughs after six months. Hence the submissions made on the basis of the provisions of Section 264 are misconceived.

50. In view of the above discussion, we find no reason for declining issuance of the writ of mandamus or for vacating the interim directions requiring the respondents to hold and complete the elections in October 2005.

As regards the status of the 60 areas converted from gram panchayats into nagar panchayats by Government Notification dated 10th/12th August 2005 and determination of number of seats for different taluka panchayats and district panchayats and reservation of seats, we direct that for the purposes of holding elections to 209 taluka panchayats and 23 district panchayats in October 2005, the State Election Commission shall hold elections for the constituencies already determined on the basis of the 1991 census without waiting for completion of the delimitation exercise on the basis of 2001 census figures and these elections shall be conducted on the basis of electoral rolls revised in 2004. The 60 areas in question will be treated as parts of the respective taluka panchayats and district panchayats for the purpose of the ensuing elections but this direction shall not preclude the State government and the State Election Commission from undertaking or completing the exercise of demarcation of the boundaries of those areas, delimitation of their constituencies and preparation of the electoral rolls for those constituencies for the purpose of holding elections to the municipal boroughs in those areas.

51. The petitions are accordingly allowed in the aforesaid terms. Rule is made absolute.

The prayer in Civil Application No. 9030 of 2005 for recalling and modifying the order dated 27th September 2005 is rejected.

(M.S. SHAH, J.)

(D.H. WAGHELA, J.)

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